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No. .....

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

SEYMOUR SIFLINGER,

Petitioner,

vs.

WILLIAM E. BROCK,
Secretary of Labor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. THE EMPLOYEES RETIREMENT INCOME SECURITY ACT VIOLATES THE EQUAL PROTECTION CLAUSE. IT EXEMPTS FROM ITS PURVIEW CHURCHES AND CORPORATIONS OWNED BY CHURCHES BUT DOES NOT EXEMPT ANY OTHER ELEEMOSYNARY ORGANIZATION. THE CLASSIFICATION IS PATENTLY UNREASONABLE.

II. WHERE THE GOVERNMENT PROVES THAT A UNION WAS ESTABLISHED FOR THE SOLE PURPOSE OF MARKETING INSURANCE, THE UNION'S INSURANCE PLANS ARE NOT EMPLOYEES RETIREMENT INCOME SECURITY ACT PLANS AND THE DISTRICT COURT HAS NO JURISDICTION OVER AN ACTION BY THE SECRETARY OF LABOR RESPECTING THEM; JURISDICTION OVER THEM IS RESERVED TO THE STATE INSURANCE COMMISSIONERS.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the title of the case.

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OFFICIAL REPORTS

The Opinion to which certiorari is here sought was not reported at the direction of the Circuit Court of Appeals for the Eleventh Circuit.

———o———

GROUNDS ON WHICH JURISDICTION IS INVOKED

The Opinion of the United States Court of Appeals for the Eleventh Circuit herein sought to be reviewed was entered May 14, 1987. A timely filed Petition for Rehearing was denied by Order entered July 7, 1987.

The statutory provision believed to confer on this Court jurisdiction to review the Judgment and Opinion in question by Writ of Certiorari is 28 United States Code, § 1254.

———o———

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

1) Constitution of the United States, Article V:

> "No person shall be held . . . deprived of life, liberty, or property, without due process of law;
> . . . .

2) Employees Retirement Income Security Act, 26 United States Code, § 100 1 et seq.:

> Appropriate portions of the statute are quoted at the commencement of the Argument section.

———o———

STATEMENT OF THE CASE

This cause comes to this Court on the Petition of Seymour Siflinger for review of an Opinion in the United States Court of Appeals for the Eleventh Circuit affirming a Judgment of the United States District Court in and for the Southern District of Florida entered in favor of the Respondent Brock as Secretary of Labor and against your Petitioner. The Opinion here sought to be reviewed appears at Appendix 1 et seq.; further references in this Petition to the Appendix hereto will be made by use of the symbol "A" with appropriate page number.

The parties will be referred to herein by proper name or by standing here or below as appropriate.

Brock sued Siflinger in the United States District Court in and for the Southern District of Florida. The substance of the case was that the Secretary of Labor asserted that Siflinger and others violated the Employee Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. 1,001. et seq. The thrust of the Complaint was that Siflinger breached his fiduciary duty to an employee benefit plan set up as the Consolidated Labor Union Trust by Local 227 of the Office and Professional Employees International Union.

Siflinger moved in the District Court to dismiss on the ground that the Employee Retirement Income Security Act is invalid and violative of the United States Constitution. Copies of the Motion to Dismiss and Memorandum in Support thereof appear at App. 7 et seq. The trial court, by bare bones order, denied the Motion (App. 13). The contention of your Petitioner is that ERISA is unconstitu-

tional because it unreasonably classifies by exempting churches and church owned corporations only from its operation as will be further discussed.

The Motion to Dismiss having been denied, your Appellant answered, the case came on for trial and at the conclusion of the trial, the trial court entered a Final Judgment (App. 14 et seq.) which was appealed to the Eleventh Circuit. The Eleventh Circuit's Opinion gives rise to this Petition.

The substantive facts giving rise to the case were that Local 227 of the Office and Professional Employees International Union was chartered February 12, 1979 to represent employees in the State of Florida. On April 2, 1979, the Consolidated Labor Union Trust was established for the purpose of providing medical benefits to the members of Local 227. Siflinger had nothing to do with the organization of the Union or the obtaining of its charter and, in fact, had nothing to do with the formulation of the Consolidated Labor Union Trust which was the product of Professional Management. However, when the Consolidated Labor Union Trust was established, Siflinger was named and functioned as a member of the Plan's Benefit Committee from April 2, 1979 until early October, 1979 when he resigned. Between the time in April when he became a member and the time in October when he resigned, the Benefit Committee never met, never transacted any business, never hired or fired anyone, never engaged any accountants, never received any reports and there was no business for it to transact. Siflinger resigned because he was a licensed insurance agent in the State of Florida and

the Insurance Commissioner's Office did not want to have a licensed agent serving on a Benefit Committee.

Siflinger was the principal in a company which sold insurance and which became the State agent for the sale of insurance under the plan. Agents would become members of the Union and would then sell the insurance to others. Siflinger hired a network of agents and sub-agents under them to promote the plan. All those participating in the plan were required to become members of the Union. A commission of 40% of the first year premiums was paid through the Siflinger organization to that organization and the various agents and sub-agents. The commission is consistent with what the actuaries who formulated the plan projected for commissions and was lower than some commissions charged in the industry. Siflinger is an insurance salesman but is neither an accountant, a lawyer, an actuary, or statistician and has never had any connection with the formation of an insurance company, or the formation of any insurance plan or benefit plan, or any scheme for the coverage, insurance coverage or coverage similar to insurance coverage. Furthermore, Siflinger had no part in the formation or construction of the Benefit plan at issue and when he was approached with the idea of marketing the plan, that plan was already in existence and the actuarial and statistical studies in connection with the plan had been done. Mr. Siflinger had nothing to do with the hiring of the management association that was going to run the plan, but, to the contrary, that management association, which was already in place hired him to sell the plan.

The plan filed the reports of its operation required by the Secretary of Labor. The Secretary caused an investi-

gation to be made of the plan continuing from April of '82 until December of '82, but the result of the investigation did not apparently result in anyone communicating to the plan any recommendation or suggestion respecting changes that ought to be implemented by the plan.

The only activity of the Union visible in the record, or otherwise, was the marketing of this insurance plan. At the conclusion of the Plaintiff's case, it became apparent that the Secretary had proven beyond doubt that the only purpose of the plan was the purpose of marketing insurance. At the close of the testimony, Siflinger called this fact to the trial court's attention and pointed out that if the plan was organized solely for the purpose of marketing insurance, it would not be an ERISA plan under *Bell vs. Employer's Security Benefit Association*, 437 F. Supp. 382. If the plan was not an ERISA plan, then the District Court had no jurisdiction over it and jurisdiction over any problem with the plan would lie with the State Insurance Commissioner. The question of constitutionality was again advanced to the District Court. The District Court rejected these contentions, adopted a set of Findings of Fact in the form submitted by the Secretary and then entered the Final Judgment giving rise to the appeal. The Eleventh Circuit, in the Opinion hereto annexed, denied our contentions giving rise to this Petition.

———o———

ARGUMENT

I. ERISA VIOLATES THE EQUAL PROTECTION CLAUSE AND IS INVALID.

26 USC, § 1003 provides in pertinent part:

". . . (b) The provisions of this title shall not apply to any employee benefit plan if . . .

(2) Such plan is a church plan (as defined in 29 USC, § 1002 (33) with respect to which no election has been made . . . "

29 USC, § 1002 (33) provides in pertinent part:

"(a) The term 'church plan' means the plan established and maintained . . . by a church or by a convention of association of churches which is exempt from tax under § 501 of the Internal Revenue Code of 1954 . . .

(C) For purposes of this paragraph—

(ii) The term employee of a church or a convention or association of churches includes

(1) A duly ordained, commission, or licensed minister of a church in the exercise of its ministry, regardless of the source of his compensation;

(iii) An employee or an organization, whether a civil law corporation or otherwise which is exempt from tax under § 501 of the Internal Revenue Code of 1954 and which is controlled by or associated with a church or a convention or association of churches. . . . "

26 USC, § 501 exempts from tax certain organizations including Community Chests, funds or foundations organized and operated exclusively for religious, charitable, scientific testing for public safety, literary or educational

purposes or labor, agricultural or horticultural organizations, business leagues, fraternal benefit societies, domestic fraternal societies, religious or apostolic associations or corporations and similar bodies.

Congress in the ERISA statute has under the foregoing provisions exempted from ERISA churches, employees of churches and corporation owned or controlled by churches which corporations are exempt from tax under § 501 of the Internal Revenue Code. Everyone else is included. All of the eleemosynary endeavors exempt from tax under § 501 of the Internal Revenue Code are included in ERISA, unless they are owned by a church, in which case they are excluded as is the church itself. If we have a corporation which holds title to millions of dollars worth of property and has 1,000 employees, and the owner of the stock in that corporation turns the stock over to the Community Chest, then its Employee Benefit Plan is under ERISA. If the owner of the stock turns it over to his church, it is not. Similarly, employees of the United Fund are covered by ERISA. Employees of the Bishop's Relief Fund are not. This attempted classification is completely unreasonable, unjustifiable and without foundation and consequently violates the Equal Protection Clause.

While Congress unquestionably has the power to reasonably classify, that power is subject to limitations. Congress may not permit a discrimination by which persons engaged in the same business are subjected to different restrictions, or held entitled to different privileges under the same conditions. The restrictions must operate equally upon all persons pursuing the same business or profession under the same circumstances. A statute will not be sus-

tained which selects particular individuals from a class and subjects them to peculiar rules or imposes upon them special obligations or burdens from which others in the same class are exempt. *Minneapolis and St. Louis Railway Company vs. Beckwith*, 129 U. S. 26, 32 L. Ed. 585, 9 S. Ct. 207; *Soon Hing vs. Crowley*, 113 U. S. 703, 28 L. Ed. 1145, 5 S. Ct. 730; *Truax vs. Raich*, 239 U. S. 33, 60 L. Ed. 131, 36 S. Ct. 7.

We respectfully suggest that the statute is invalid because it unreasonably classifies.

The Government asserts that Mr. Siflinger does not have standing to challenge the classification in this case. However, the plan for which Mr. Siflinger is brought before the courts is one allegedly promulgated by a Labor Union. A Labor Union is an exempt organization under § 501 of the Internal Revenue Code of 1954 which is incorporated into ERISA by reference in 26 USC, § 1003. If the portion of the statute limiting the exemption to churches is found unconstitutional, then by the Government's construction of the severance clause, the exemption from ERISA of organizations exempt under § 501 of the Internal Revenue Code will remain, the Labor Union will be exempt and Mr. Siflinger will have no accountability to the United States Courts or the Labor Department. Clearly, he has standing to raise the issue.

The Government asserts that a justification for the classification is the question of confidentiality of church records. There is no such confidentiality, so it cannot be the basis of this classification. The privilege of priest and penitent, which existed at common law, has been broadened to include confidential private communications be-

tween clergymen and their parishoners by the Federal Evidence Code, § 501. However, as has been pointed out, *United States vs. Gordon,* 493 F. Supp. 822 (No. Dist. N. Y. 1980), the privilege only encompasses confidential private communications between the clergymen and the parishoner in which the parishoner reveals flawed acts or thoughts in return for consultation or guidance. It does not extend to conversations about business or other extraneous matter and it certainly never extended and cannot be extended to any matters outside the actual immediate relation of the clergymen and parishoner. If a church is a party to a lawsuit, the church is subject to a subpoena with respect to business records in precisely the same manner as any other litigant. There simply is no such confidential relationship or privilege.

The next argument advanced is that there would be an excessive cost imposed on churches which cannot pass the costs along as can businesses for profit. This is precisely the same for the rest of the eleemosynary organizations which are the subject of § 501 of the Internal Revenue Code.

Finally, an argument is made about entanglement between church and state. In this connection, it should be pointed out that your Petitioner is not raising the establishment clause in this case. We are not here concerned with the establishment of religion. We are concerned with the reasonableness of classification. The cases which are relied upon by the Government are by and large cases involving the establishment clause. There are, however, certain exceptions to this. In *Walz,* 379 U. S. 664 (1970), this Court was dealing with a tax exemption in which

churches were exempt in a broad class of property owned by non-profit quasi public corporations, including hospitals, libraries, playgrounds, professional, historical and patriotic groups. The Court held that this inclusion of churches in a classification of eleemsynary institutions for the purposes of tax exemption was not a violation of the establishment laws. We certainly agree. However, *Walz* is not applicable to this case. In *Roemer,* 426 U. S. 736, this Court was faced with a State Statute which provided aid to all schools (including parochial schools). The Court held that this was proper if the purpose of the statute was secular, it did not serve to advance religion and there was no unusual entanglement between church and state. In short, where church schools were included in a grant of educational aid to all schools, the simple fact that the schools were operated by a church did not serve to render the statute unconstitutional as an establishment. We agree with that. If churches were exempt from ERISA along with other eelomosynary institutions who were in the same reasonable classification, and if they are so exempt, then we cannot quarrel with the statute. In *St. Martin Evangelical Lutheran Church,* 451 U. S. 772 and *N.L.R.B. vs. Catholic Bishop of Chicago,* 440 U. S. 490, this Court held that the statute did not grant the powers which the government agencies were asserting that it granted. It thus was not required to reach any constitutional questions since it found that there was no jurisdiction.

In summary, this is not an establishment question. It is a classification question under the equal protection of the laws. This classification cannot be sustained on any factual basis under the provisions of the Equal Protection Clause.

II. THE GOVERNMENT HAS PROVEN THAT THE PLAN IS NOT AN ERISA PLAN AND CONSEQUENTLY THE COURT DOES NOT HAVE JURISDICTION OVER IT OR THIS ACTION.

In the preparation of this case, the Plaintiff and Defendant agreed in the Pretrial Stipulation filed in this cause that the plan at bar is an ERISA covered plan.

It then developed on proof in the Government's case that clearly, the sole purpose of the Union and the organization of the plan was to market insurance under the plan. The Department of Labor has consistently taken the position, as set out in *Bell vs. Employers Securit yBenefit Association,* 437 F. Supp. 382, that such a plan is not under ERISA. If it is not under ERISA, as in fact the Government cautioned at the inception of the plan when they sent out their letter of advice (App. 18) then the Department has no jurisdiction over the plan, the Court has no jurisdiction over this case and the State Insurance Commissioner of Florida is the one who should be concerned about the problem, if anyone.

In its anxiety to prevail in this case, the Government is willing to take the position that a union organized for no purpose other than to provide health benefits is qualifed as a Labor Union and its plan qualified under ERISA. When it does so, and if it does so, it will, of course, remove all such plans from the jurisdiction of state insurance regulation. As is shown by the exhibit introduced in evidence and by *Bell vs. Employees Security Benefit Association,* 437 F. Supp. 382, the Department's position has consistently been and it has consistently and correctly inter-

preted its statute to mean that where an organization is created for the purpose of offering health benefits and existing for no other purpose, it will not qualify under ERISA.

———o———

CONCLUSION

This Petition brings to this Court two questions of first impression—one involving the constitutionality of a United States statute and the other involving the jurisdiction of the Federal District Court and more broadly the question of whether the Department of Labor can assert jurisdiction over insurance plans which are not connected with ERISA to exclude State insurance regulatory authorities. In the context of Congress' reluctance to interfere with state control over the insurance industry (for example their exclusion of insurance companies from the bankruptcy laws on the ground that state administration of the liquidation of such companies is preferable policy) as well as the stated position of the Department of Labor prior to this case and the holding of the Federal District Court in the *Bell* case, the question presented is one of broad implication for the Federal Government and the States, as well, of course, as for the Federal District Courts in the exercise of their jurisdiction.

Respectfully submitted,

SHALLE STEPHEN FINE
(Counsel of Record)
46 S. W. First Street
Miami, FL 33130
305/358-1515

Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were mailed to William W. Taylor, Esq., U. S. Department of Labor, P. O. Box 1914, Washington, D. C. 20013 this 3 day of October, 1987.

/s/ Shalle Stephen Fine

SHALLE STEPHEN FINE

APPENDIX

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5694
Non-Argument Calendar

WILLIAM E. BROCK, Secretary of the United States Department of Labor,

Plaintiff-Appellee,

versus

PATRICK CRAPANZANO, et al.,

Defendants,

SEYMOUR SIFLINGER,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(May 14, 1987)

Before FAY, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:

This appeal, which raises a constitutional challenge to the Employee Retirement Income Security Act, 29 U.S.C.A. secs. 1001-1461 (ERISA), arose when plaintiff-appellee Secretary of the United States Department of Labor (the Secretary) filed suit alleging that 12 defendants, including defendant-appellant Seymour Siflinger, had breached their ERISA-imposed fiduciary duties to Consolidated Labor Union Trust (the Plan). The Plan was an em-

ployee benefit plan sposonred by Local 227 of the Office and Professional Employees International Union (Local 227). After a bench trial, Siflinger was ordered to pay restitution for excessive fees incurred by the Plan in violation of Siflinger's fiduciary responsibilities. This appeal ensued. We affirm.

Siflinger raises three issues in his appeal, only two of which warrant discussion. First, ERISA is unconstitutional, in Siflinger's view, because it excludes from its coverage certain employee benefit plans maintained by religious organizations, 29 U.S.C. sec. 1003(b)(2), and thereby violates his equal protection rights.[1] Before we undertake the study required by a constitutional claim based on the difficult issue of equality, our duty of restraint requires us to consider first the question of standing. We conclude that Siflinger lacks standing to raise this issue.

Siflinger has standing to challenge the "church plan" exemption as unconstitutionally underinclusive only if he can establish a "personal stake" by establishing a "fairly traceable" causative link between the challenged action and his injury. *See Duke Power Co. v. Caroina Environmental Study Group, Inc.*, 438 U.S. 59, 72, 98 S.Ct. 2620, 2630, 57 L.Ed.2d 595 (1978). Proving a "fairly traceable" link requires Siflinger to show it is "substantially likely" the relief he requests would redress his injury. *See id.* at

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[1]We assume Siflinger refers to the equal protection guarantee that the Supreme Court has held arises from the fifth amendment, *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954), and not the equal protection clause of the fourteenth amendment, which obviously is inapposite here.

74, 75 n.20, 98 S.Ct. at 2631 & n.20. Thus, on the facts of this case, Siflinger must show that *all* plans, whether secular or religious, will be exmept were we to rule ERSIA's church plan exemption unconstitutional.

We need not engage this examination further. If possible, we should refrain from striking down more of a statute than is necessary, severing only the unobjectionable portion of a statute and leaving the unoffending portions. *Alaska Airlines, Inc. v. Brock*, 55 U.S.L.W. 4396, 4398 (U.S., March 24, 1987) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion)). " 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part, may be dropped if what is left is fully operational as a law.' " *Alaska Airlines*, 55 U.S.L.W. at 4398 (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam)).

Siflinger has not made the necessary showing; he cannot fairly trace his liability to the allegedly unconstitutional provision, *see Duke Power Co.*, 438 U.S. at 72, 75 & 10, 98 S.Ct. at 2630, 2631 & n.20, and the remaining part of the statute would stand as a fully operational law were the offending portion stricken. Siflinger, therefore, has no standing to challenge the constitutionality of ERISA; and we must refuse to issue an advisory opinion on the subject.

Siflinger also maintains that the Plan was not an "employee benefit plan" as defined by ERISA because

the Plan existed solely for the sale of insurance.[2] ERISA's definitional framework defeats this contention. 29 U.S.C.A. sec. 1002(3) provides that employee benefit plans are of two types: "employee pension benefit" plans or "employee welfare benefit" plans. To qualify as an "employee welfare benefit" plan, the plan must (1) provide a welfare benefit, such as medical or hospitalization benefits, and (2) be either established or maintained by an employer or an "employee organization." 29 U.S.C.A. sec. 1002(1). Both standards have been met.[3] The definition of "Employee organization" is provided at 29 U.S.C.A. sec. 1002(4) and includes "any labor union . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships."

The district court determined that Local 227, which was affiliated with the AFL/CIO, met the definition of a union and that it existed, at least in part, for the purpose of dealing with employers on "matters incidental to employment relationships." We agree. Siflinger's argument that Local 227 was a sham union is, no doubt, in large part correct. Nevertheless, Local 227 meets the mini-

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[2]We note that Siflinger stipulated, prior to trial, that the Plan was an employee benefit plan under ERISA. At the close of the government's case-in-chief, however, he raised the contention that the Plan was not an employee benefit plan because it existed solely for the purpose of selling insurance. Stipulations serve useful purposes, and later efforts to avoid them are not favored.

[3]It is uncontroverted that the Plan meets the first part of this definition; i.e., it provides welfare benefits to its participants.

mum requirements necessary to qualify as an "employee organization". Thus, the Plan meets all the criteria of an "employee welfare benefit plan" under ERISA.

After a thorough review of the record and Siflinger's submissions, we find Siflinger's remaining argument without merit and not worthy of discussion.[4]

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5694

WILLIAM E. BROCK, Secretary of the United States Department of Labor,

Plaintiff-Appellee,

versus

PATRICK CRAPANZANO, et al.,

Defendants,

SEYMOUR SIFLINGER,

Defendant-Appellant.

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[4]Siflinger's last argument basically is that the record supported neither the district court's finding that the fees charged were excessive nor that he was sufficiently responsible for the amount of excessive fees for which Siflinger was held liable. The record, however, fully supports the district court's conclusions.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING

(Filed July 7, 1987)

BEFORE: FAY, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant, Seymour Siflinger, is denied.–

ENTERED FOR THE COURT:

/s/ J. L. Edmondson
United States Circuit Judge

REHG-4
(Rev. 9/85)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-1899 Civ-Eaton

RAYMOND J. DONOVAN, Secretary of the United States Department of Labor,
Plaintiff,

vs.

SEYMOUR SIFLINGER, et al.,
Defendants.

---/

MOTION TO DISMISS

COMES NOW the Defendant SEYMOUR SIFLINGER, by and through counsel undersigned, and moves to dismiss this Complaint on the grounds that the statute under which the Plaintiff is proceeding, to-wit: the Employment Retirement Income Security Act, Title 29 United States Code, § 1001 et seq. is invalid on the ground that it violates the provisions of the United States Constitution. Movant adopts and incorporates into this Motion his position as set forth in his Memorandum accompanying this Motion.

/s/ SHALLE STEPHEN FINE
Attorney for Seymour Siflinger
370 Minorca Avenue, Suite 15
Coral Gables, FL 33134
444-8845

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed to Richard P. Carr, Esq., U. S. Department of Labor, Office of the Solicitor, Plan Benefits Security Division, P. O. Box 1914, Washington, D. C. 20013, and Sparber, Shevin, Shapo and Heilbronner, P. A., 1 S. E. Third Avenue, Miami, FL 33131, this 29 day of October, 1984.

/s/ Shalle Stephen Fine
SHALLE STEPHEN FINE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-1899 Civ-Eaton

RAYMOND J. DONOVAN, Secretary of the United States Department of Labor,

Plaintiff,

vs.

SEYMOUR SIFLINGER, et al.,

Defendants.
_____/

MEMORANDUM

In support of Motion to Dismiss, the Defendant Siflinger, by and through counsel undersigned, files this Memorandum in support of his Motion to Dismiss the Complaint in this cause and says:

1) Movant asserts that the Employment Retirement Income Security Act (ERISA) violates the provisions of the United States Constitution. A review of pertinent portions of the Act and related Acts is necessary to establish the framework of his argument:

a) 26 United States Code, § 1003 provides in pertinent part:

> "... (b) the provisions of this title shall not apply to any employee benefit plan if ...
>
> (2) such plan is a church plan (as defined in 29 United States Code, § 1002 (33) with respect to which no election has been made under § 410 (d) of the Internal Revenue Code of 1954 (26 United States Code, § 410 (d);" [26 U. S. Code, § 410 (d) relates to Mini-

mum participation standards for pensions and profit sharing plans and provides in subsection (d) that churches which are otherwise excluded may make an election to come under the provisions of the statute. —ed.]

b) 29 United States Code, § 1002 (33) provides in pertinent part:

"(a) The term 'church plan' means a plan established and maintained . . . by a church or by a convention or association of churches which is exempt from tax under § 501 of the Internal Revenue Code of 1954. . . .

(C) For purposes of this paragraph—

(ii) The term employee of a church or a convention or association of churches includes—

(I) A duly ordained, commission, or licensed minister of a church in the exercise of its ministry, regardless of the source of his compensation;

(II) An employee of an organization, whether a civil law corporation or otherwise which is exempt from tax under § 501 of the Internal Revenue Code of 1954 and which is controlled by or associated with a church or a convention or association of churches . . ."

c) Title 26 United States Code, § 501 relates to exemption from tax on corporations certain trusts, etc. and provides that the organizations described shall be exempt from taxation. The organizations included are, among others:

1) Corporations organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt under this section;

2) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for

religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which enures to the benefit of any private shareholder or individual;

3) Labor, agricultural, or horticultural organizations;

4) Business leagues, chambers of commerce, real estate boards, boards of trade, or professional football leagues (whether or not administering a pension fund for football players), not organized for profit;

5) Fraternal beneficiary societies, orders, or associations operating under the large system or for the exclusive benefit of the members of a fraternity itself operating under the large system and providing for the payment of life, sick, accident or other benefits to the members of such society, order or association or their dependants;

6) Voluntary employees beneficiaries associations providing for the payment of life, sick, accident or other benefits to the members of such association or their dependents;

7) Domestic fraternal societies, orders, or associations, operating under the large system the net earnings of which are devoted exclusively to religious, charitable, scientific, literary, educational and fraternal purposes, and which do not provide for the payment of life, sick, accident or other benefits;

8) Religious or apostolic associations or corporations if such associations or corporations have a common treasury or community treasury even if such associations or corporations engage in business for the common benefit of the members.

2) Congress, in the ERISA statute, has thus exempted from the statute's operation churches, employees

of churches and corporations owned or controlled by churches which are exempt from tax under § 501 of the Internal Revenue Code. Everyone else is included. Therefore, under the Classification scheme, all of the eleemosynary endeavors exempt from tax under § 501 of the Internal Revenue Code are included in ERISA, unless they are owned by a church, in which case they are excluded as is the church itself. If we have a corporation which holds title to $100,000,000 worth of real property and has 1,000 employees, and turns over the proceeds of its operations to the community chest, then its employee benefit plan is included under ERISA. If it turns it over to a church, it is not. We submit that this attempt at classification is totally unreasonable, unjustifiable and without foundation and that consequently, the statute is invalid since it violates the equal protection clause.

3) There is no doubt that congress has the ability to reasonably classify. It appears that there is equally no doubt that the power to classify is subject to limitations. Congress may not permit a discrimination by which persons engaged in the same business as subjected to different restrictions or held entitled to different privileges under the same conditions. The restrictions must operate equally upon all persons pursuing the same business or profession under the same circumstances. A statute will not be sustained which selects particular individuals from a class and subjects them to peculiar rules or imposes upon them special obligations or burdens from which others in the same class are exempt. *Minneapolis and St. Louis Railway Company vs. Beckwith,* 129 U. S. 26, 32 L. Ed. 585, 9 S. Ct. 207; *Soon Hing vs. Crowley,* 113 U. S. 703, 28 L. Ed. 1145, 5 S. Ct. 730; *Truax vs. Raich,* 239 U. S. 33, 60 L. Ed. 131, 36 S. Ct. 7.

4) We suggest that what the law states above is Black Letter Law. We further urge that applying those principles to the classification in this statute, we find that congress has selected one type of eleemosynary endeavor, that is to say churches and has exempted it and has included every other kind of eleemosynary endeavor within the statute. But Congress has gone further. The same identical eleemosynary activity can be exempt or included depending upon who owns or controls it. We suggest that in the light of the stated purposes of the ERISA statute and the congressional findings of fact which induced it, which are made part of the statute, this classification is unsustainable and the statute must fail.

WHEREFORE, based upon the reasons and authorities above set forth, we respectfully request that the Complaint be dismissed.

Respectfully submitted,

SHALLE STEPHEN FINE
Attorney for Seymour Siflinger
370 Minorca Avenue St. 15
Coral Gables, FL 33134
444-8845

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed to Richard P. Carr, Esq., U. S. Department of Labor, Office of the Solicitor, Plan Benefits Security Division, P. O. Box 1914, Washington, D. C. 20013, and Sparber, Shevin, Shapo and Heilbronner, P. A., 1 S. E. Third Avenue, Miami, FL 33131, this 29 day of October, 1984.

SHALLE STEPHEN FINE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-1899-Civ-EATON

RAYMOND J. DONOVAN, Secretary of the United States Department of Labor, Plaintiff, vs. PATRICK CRAPANZANO, et al., Defendants.	ORDER (Filed January 30, 1985)

THIS CAUSE is before the Court on Defendant, SEYMOUR SIFLINGER'S Motion to Dismiss. Defendant, SEYMOUR SIFLINGER, claims that the Employment Retirement Income Security Act, Title 29 U.S.C. § 1001 et seq. is invalid on the ground that it violates the provisions of the United States Constitution.

Upon consideration of the record in this cause and the applicable constitutional standards, it is

ORDERED and ADJUDGED that SEYMOUR SIFLINGER's Motion to Dismiss be, and the same hereby is, DENIED. The Defendant, SEYMOUR SIFLINGER, shall serve his responsive pleading to Plaintiff's Complaint within 20 days after notice of the Court's ruling.

DONE and ORDERED at Miami, Southern District of Florida, this 30 day of January, 1985.

/s/ Joe Eaton
United States District Judge

cc: counsel of record

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

WILLIAM E. BROCK, Secretary of the United States Department of Labor, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 84-1899 (RYSKAMP, J.)
PATRICK CRAPANZANO, *et al.*, Defendants.	)	

FINAL JUDGMENT

(Filed July 23, 1986)

This action came on for trial before the Court as to defendants Seymour Siflinger and Tony Abad, the undersigned Judge presiding. In addition, plaintiff filed an application for Default judgment as to defendant Norman Hochdorf. The issues as to Siflinger and Abad having been duly tried and a decision having been duly rendered pursuant to the Court's Findings of Fact and Conclusions of Law issued this date, and the Court having

found defendant Norman Hochdorf to be in default, it is hereby:

ORDERED AND ADJUDGED that judgment be entered against the defendants Seymour Siflinger, Tony Abad and Norman Hochdorf as follows:

1. *Restitution*

a. Defendant Seymour Siflinger shall, within thirty (30) days of the entry of this Judgment, make restitution to the Consolidated Labor Union Trust in an amount equal to $319,751, which sum includes pre-judgment interest in the amount of $131,770. *See* Appendix page 1 (amounts 5, 6, and 7), page 4 (amounts 6 and 7) and page 6 (Item A).

b. Defendant Tony Abad shall, within thirty (30) days of the entry of this Judgment, make restitution to the Consolidated Labor Union Trust in an amount equal to $664,151, which sum includes pre-judgment interest in the amount of $70,573. *See* Appendix page 1 (amounts 2 and 4), page 2 (amount 2), page 3 (amount 4) and page 6 (item B).

c. Defendant Hochdorf shall, within 30 days of the entry of this Judgment, make restitution to the Consolidated Labor Union Trust in an amount equal to $72,304, which sum includes pre-judgment interest in the amount of $38,552. *See* Appendix page 1 (amounts 10 and 11), page 5 (amounts 10 and 11) and page 6 (item C).

d. In addition to the amounts set forth above, Defendants Siflinger and Abad shall jointly and severally, within thirty (30) days of the entry of this Judgment, make restitution to the Consolidated Labor Union Trust in an

amount equal to $213,183, which sum includes prejudgment interest in the amount of $44,006. *See* Appendix page 1 (amounts 8 and 9), page 4 (amount 8), page 5 (amount 9) and page 6 (item D).

e. In addition to the amounts set forth above, Defendants Siflinger and Hochdorf, shall jointly and severally, within 30 days of the entry of the Judgment, make restitution to the Consolidated Labor Union Trust in the amount of $158,711, which sum includes pre-judgment interest in the amount of $85,653. *See* Appendix page 1 (amounts 1 and 3, page 2 (amount 1), page 3 (amount 3) and page 6 (item E).

Interest, computed pursuant to 28 U.S.C. § 1961, shall accrue on any amounts of restitution or pre-judgment interest remaining unpaid after thirty days from the entry of this Judgment.

2. *Prospective Injunctions*

Defendants Siflinger, Abad and Hochdorf are hereby permanently enjoined from acting, either directly or indirectly, in any fiduciary capacity or from furnishing, either directly or indirectly, any service as a service provider to the Consolidated Labor Union Trust or any other employee benefit plan covered by Title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001-1145)).

3. *Costs*

In accordance with 28 U.S.C. § 2412(a) and Rule 54(d), Fed R. Civ. P., plaintiff's costs in conducting this

litigation shall be taxed against defendant Siflinger and Abad. Upon appropriate motion, the court will determine an amount of costs to be taxed in favor of plaintiff.

DONE and ORDERED in Chambers at Miami, Florida this 22nd day of July, 1986.

/s/ Kenneth L. Ryskamp
UNITED STATES
DISTRICT JUDGE

Copies furnished to:
all counsel of record

CALCULATIONS OF PRE-JUDGMENT INTEREST
AND RESTITUTION AMOUNTS

I. CALCULATION OF PRE-JUDGMENT INTEREST

LEGEND

Amount # 1	Siflinger and Hochdorf Excessive Administrative Fees	(p. 13*)
Amount # 2	Abad Excessive Administrative Fees	(pp. 13-14)
Amount # 3	Siflinger and Hochdorf Commissions Paid by Plan while Defendant was Fiduciary	(pp.18-19)
Amount # 4	Abad Commissions Paid by Plan while Defendant was Fiduciary	(p. 19)
Amount # 5	Siflinger Commissions Received from Plan in 1980	(p. 20, Pl. Tr. Exh. 20)
Amount # 6	Siflinger Commissions Received from Plan in 1981	(p. 20, Pl. Tr. Exh. 20)

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* Page citations are to Plaintiff's Post Trial Brief. "Stmt. of Losses" refers to plaintiff's Statement of Plan Losses Attributable to Norman Hochdorf.

LEGEND

Amount # 7	Siflinger Commissions Received from Plan in 1982	(p. 20, Pl. Tr. Exh. 20)
Amount # 8	Siflinger Commissions Received from Plan in 1983	(p. 20, Pl. Tr. Exh. 20)
Amount # 9	Siflinger Commissions Received from Plan in 1984	(p. 20, Pl. Tr. Exh. 20)
Amount #10	Hochdorf Administrative Fees Received from Plan while Fiduciary minus Amount # 1	(Stmt. of Losses)
Amount #11	Hochdorf Unpaid balance of Assets Removed from Plan	(Stmt. of Losses)

APPENDIX

(Calculation Tables Are Not Reproduced)

DEPARTMENT OF LABOR

Labor-Management Services Administration
Washington, D. C. 20216

Reply to the Attention of:

(SEAL)

Jan. 12 1981

Mr. Dean A. Mixon
Weinfeld & Mixon
Suite 203
601 North Parkcenter Drive
Santa Ana, California 92705

Dear Mr. Mixon:

This is in response to your letters of July 16, 1979, and October 12, 1979, requesting an advisory opinion regarding coverage under the Employee Retirement Income Se-

curity Act of 1974 (ERISA). Specifically, you ask whether the Consolidated Labor Union Trust (the Trust) is an employee welfare benefit plan within the meaning of section 3(1) of ERISA, and whether an employee welfare benefit plan within the definition of section 3(1) can be maintained by more than one local.

You advise that the Trust was established April 2, 1979, by the Office and Professional Employees International Union, AFL-CIO Local 227 (Local 227) and Executive Insurance Advisors, Inc., to provide primarily medical benefits to union members through collectively bargained agreements with employers. The Trust permits any labor union affiliated with the AFL-CIO to become a party to the Trust to provide benefits agreed to in a collectively bargained agreement with employers. The Benefit Committee is composed of an equal number of representatives of those employers which are parties to the Trust and Local 227. Currently the Benefit Committee is composed of two representatives of Local 227, a principal of Executive Insurance Advisors, Inc., and the president of another employer. In addition, employees of Executive Insurance Advisors, Inc., were organized by Local 227 and Executive Insurance Advisors, Inc., and entered into a collectively bargained agreement with Local 227 on June 1, 1979.

Section 3(1) of ERISA defines the term "employee welfare benefit plan" to include:

> . . . any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the

purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

From the information you submitted, the Trust does provide benefits among those enumerated in section 3(1) of ERISA. Further, the Trust was established or is maintained by an employer, by an employee organization, or by both, for the purpose of providing these benefits to participants or their beneficiaries. Therefore, it is the position of the Department of Labor that the Consolidated Labor Union Trust is an employee welfare benefit plan within the meaning of section 3(1) of ERISA.

In your letter of October 12, 1979, you also inquire whether an employee welfare benefit plan within the meaning of section 3(1) of ERISA[1] can be maintained by more than one local union. In this connection you indicate that at some future time other local unions affiliated with the AFL-CIO might be "admitted" to the Trust. We assume that this means that eligibility for benefits under the Trust would be extended to members of such locals.

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[1] Your letter refers to "an employee welfare benefit plan . . . under Section 3(2) of ERISA." Section 3(2) of ERISA contains a definition of the term "employee pension benefit plan," while the definition of "employee welfare benefit plan" is in section 3(1).

In general, ERISA does not prohibit a welfare plan from providing benefits to members of more than one local union, provided that governing plan documents extend eligibility for benefits to all individuals who receive benefits. In view of the circumstances described in your letter, however, you should be aware of the Department's position that an organization that functions as a vehicle for insurance entrepreneurs to market insurance products or services, not as a *bona fide* program to provide benefits to employees, is not an employee benefit plan within the meaning of ERISA. In this regard, *see* Activity Report of the Committee on Education and Labor, H. Rep. No. 94-1785 (1976), at 48. *See also, Bell v. Employee Security Benefit Association,* 437 F. Supp. 382 (D. Kan. 1977).

As indicated above, we believe that as presently constituted the Trust is an employee welfare benefit plan. Your letters, however, mention a number of circumstances that suggest that the extension of benefits under the Trust to members of local unions other than Local 227 might be better analyzed as part of a program by which the contract administrator would market insurance products of services. Specifically, your letters indicate that one of the two employer representatives on the Trust's Benefit Committee is a principal of the contract administrator.[2] According to your October 12, 1979 letter, moreover, although the contract administrator has signed a collective bargaining agreement with Local 227 covering the administrator's employees, and although the contract administrator is obligated under the collective bargaining agreement to make

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[2] You state that originally both of the two employer representatives on the Benefit Committee were principals of the contract administrator.

contributions to the Trust on behalf of these employees, the collective bargaining agreement was not signed until June 1979, while the Trust was established on April 2 of that year. The instrument under which the Trust was established appears to have been signed April 2, 1979, by at least one individual who is described in your letter as a principal of the contract administrator and that individual appears to have signed the instrument in the capacity of a trustor. Thus, it appears that the creation of the Trust, and the contract administrator's involvement with it, actually preceded the involvement of any contributing employer. While we do not think that these facts are necessarily determinative of the character of the Trust, they raise questions concerning the possibility that the contract administrator is in control of the Trust and might use it as a vehicle for marketing insurance products or services to other local unions. If that were the case, then the Trust, in our view, would not be an employee benefit plan.[3] In view of the inherently factual nature of the questions raised by your submissions in this regard, the Department, in accordance with section 5.01 of ERISA Procedure 76-1, relating to advisory opinions (41 FR 36281, August 27, 1976, copy enclosed), will not render an advisory opinion on those questions.

In addition, you should be aware that if any members of the Trust's "Benefit Committee" who are principles of the contract administrator participated in the decision of

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[3] The fact that the Trust would not be an employee benefit plan under these circumstances does not necessarily mean that benefit programs offered to members of one or more individual local unions through the Trust would not be employee benefit plans if they met the statutory definition in section 3(3) of ERISA.

the Benefit Committee to retain the contract administrator on behalf of the Trust, their participation may have been in contravention of section 406(b)(1) of ERISA, which prohibits a fiduciary[4] with respect to a plan from dealing with the assets of the plan in his own interest or for his own account. Their participation may also have contravened section 406(b)(2), which prohibits a fiduciary with respect to a plan from acting, in his individual capacity or in any other capacity, in any transaction involving the plan on behalf of a party (or representing a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.

In your letters you raised an additional question as to whether the lack of actuarial soundness is a necessary characteristic of an employee benefit plan. You indicate that the opinion in *Bel v. Employee Security Benefit Association,* 437 F. Supp. 382 (D. Kan. 1977), might be read as standing for the proposition that lack of actuarial soundness is one of the characteristics of an employee benefit plan. Without expressing any views regarding the correct interpretation of *Bell,* the Department does not think that a program which otherwise meets the definition of "employee benefit plan" in section 3(3) of ERISA would fail to meet that definition merely because the plan sponsor or sponsors attempted to achieve actuarial soundness in funding the program. In this regard, it is sig-

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[4] Section 3(21) of ERISA provides that a person is a fiduciary with respect to a plan to the extent that, among other things, he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, or has any discretionary authority or responsibility in the administration of such plan.

nificant that in part 3 of title I of ERISA, Congress imposed minimum funding standards on certain employee pension benefit plans. If Congress had considered actuarial soundness to be inconsistent with the definition of "employee benefit plan" in section 3(3), it would not have required these employee pension benefit plans, which are employee benefit plans within the meaning of section 3(3), to be funded on an actuarially sound basis. While employee welfare benefit plans and certain employee pension benefit plans are exempt under section 301 from the minimum funding standards in part 3 of title I of ERISA, there is nothing in ERISA that would prevent plan sponsors of these types of plans from attempting to achieve actuarial soundness.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

The opinions expressed in this letter relate solely to the legal consequences of the facts described herein under title I of ERISA. In particular, we express no opinion regarding the legal consequences of those facts under section 302 of the Labor Management Relations Act, 1947.

Sincerely,

/s/ Ian D. Lanoff
Administrator
of Pension and Welfare
Benefit Programs

Enclosure

(2)

No. 87-590

FILED
DEC 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

SEYMOUR SIFLINGER, PETITIONER

v.

ANN MCLAUGHLIN,
SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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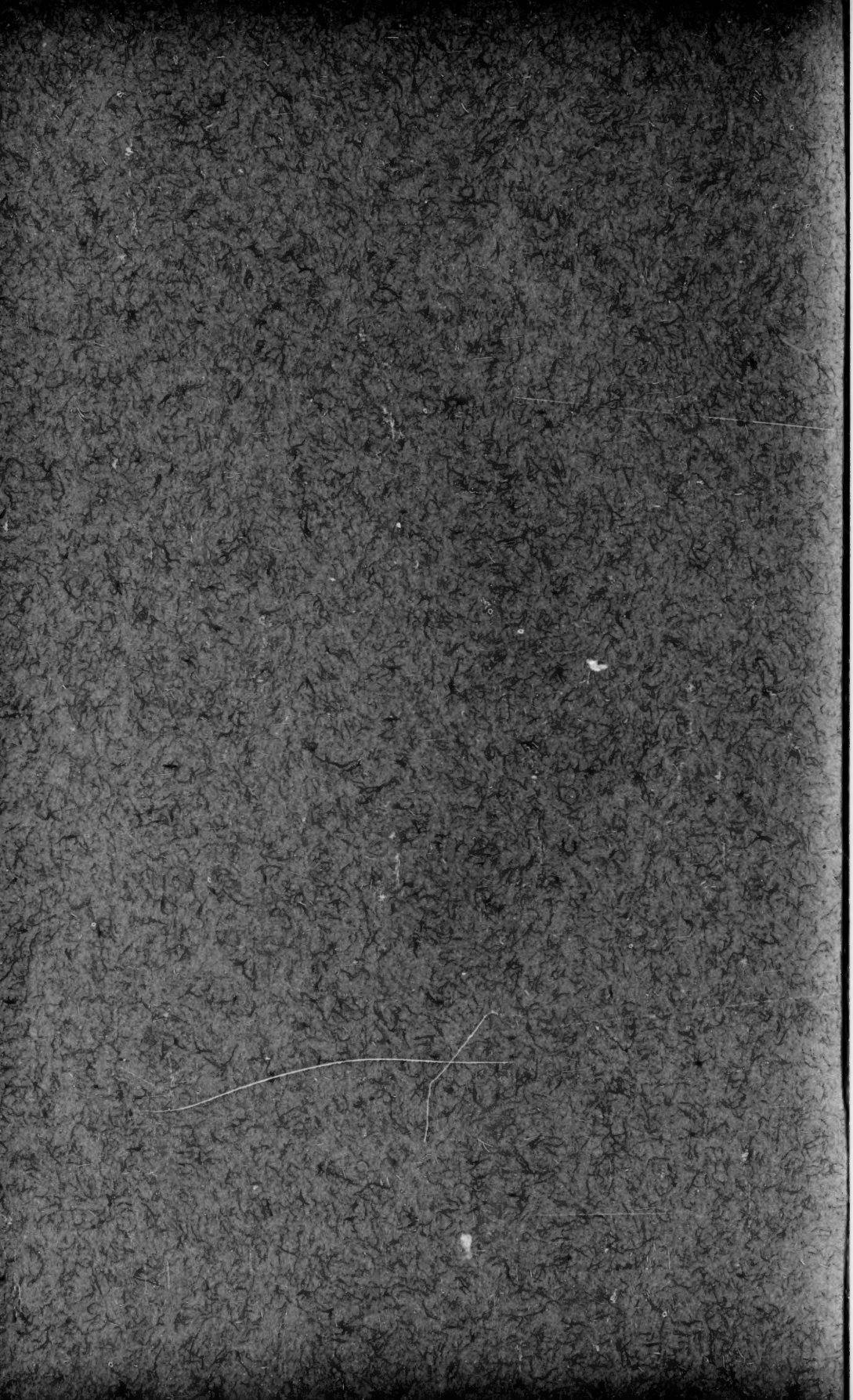

QUESTIONS PRESENTED

1. Whether petitioner, a fidicuary found liable under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. (& Supp. III) 1001 *et seq.*, for breaches of his obligations to an employee benefit plan established by a labor union, has standing to challenge ERISA's constitutionality on the ground that it exempts from coverage certain "church plans."

2. Whether the plan at issue, which was established for the purpose of providing medical benefits to union members, is an "employee benefit plan" under ERISA.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-590

SEYMOUR SIFLINGER, PETITIONER

v.

ANN MCLAUGHLIN,
SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is unreported. The final judgment of the district court (Pet. App. 14-18) and the district court's findings of fact and conclusions of law are unreported.

JURISDICTION

The judgment of the court of appeals was entered May 14, 1987. A petition for rehearing was denied on July 7, 1987 (Pet. App. 6). The petition for writ of certiorari was filed on October 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. (& Supp. III) 1001 *et seq.*, is a comprehensive remedial statute designed to safeguard the interests of millions of workers participating in employee

benefit plans. Section 3 of ERISA defines those plans to which the Act's coverage extends. 29 U.S.C. 1002. Specifically included are medical benefit plans established or maintained by labor unions. 29 U.S.C. 1002(1) and (4). Exempted from coverage are a handful of plans, including certain "church plan[s]." 29 U.S.C. 1003(b)(2). The "church plan" exception encompasses only those church plans exempted from taxation under Section 501 of the Internal Revenue Code (26 U.S.C.), and does not extend to plans established for the benefit of individuals "employed [by the church] in connection with * * * unrelated trades or businesses." 29 U.S.C. 1002(33)(A) and (B)(i).

Petitioner was an officer of Local 227, an affiliate of the Office and Professional Employees International Union, from its inception in 1979 until September 1983. Petitioner was a member of the Plan Benefit Committee of the Consolidated Labor Union Trust (the Plan), the employee benefit plan established by Local 227 to provide medical benefits to union members. Petitioner was also the "state agent" for Executive Insurance Advisors (EIA), the firm initially retained by the Plan Benefit Committee as the Plan's administrative services provider. Findings of Fact and Conclusions of Law 2-6 [hereinafter Findings].[1] While Local 227 entered into collective bargaining agreements with eight firms in South Florida (*id.* at 2), it appears that marketing the Plan was Local 227's primary activity. In order to participate in the Plan, an individual had to join the union, but "Local 227 itself imposed no requirement on eligibility for membership other than that the individual reside within the state of Florida, be of a certain age and have some form of employment" (*id.* at 4). As state agent for EIA, petitioner supervised insurance agents

[1] We have lodged with the Clerk of the Court a copy of the district court's findings of fact and conclusions of law, which are not included in the appendix to the petition.

who recruited members and enrolled them in the Plan. The agents received a commission on each new member's premium, and petitioner received an override commission. Petitioner received $357,158 in commissions from 1980 through 1984 (*id.* at 10).

In 1986, the Secretary of Labor filed this action in the United States District Court for the Southern District of Florida, charging petitioner and eleven other defendants with numerous violations of ERISA, including breaches of their fiduciary obligations to the Plan. Prior to filing his answer, petitioner moved to dismiss the complaint, arguing that ERISA is unconstitutional because it exempts "church plans" from coverage (Pet. App. 7); the district court denied that motion (*id.* at 13). After trial,[2] the court found that the Plan is covered by ERISA. It noted that the parties had stipulated that the Plan is an employee benefit plan covered by ERISA, and rejected petitioner's "belated attempt to question the Plan's status under ERISA during oral argument at trial after plaintiff rested." Findings at 13. The court explained that "[a]lthough the evidence in the record suggests that the union was operated by its officers in violation of its own governing documents, primarily as a device to aid in the marketing of health benefits, dereliction of duty by the union[']s officers does not alter the purpose for which the union was constituted and chartered" (*id.* at 14). The district court also found that the Plan Benefit Committee selected EIA (which was owned by two Committee members (*id.* at 16)) as the Plan's administrative services provider and determined its rate of compensation without determining what other firms would charge for similar services (*id.* at 6), and that EIA was overcompensated for its services (*id.* at 16).

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[2] The claims against nine of the twelve defendants were settled prior to trial. The district court entered a default judgment against one remaining defendant and judgments of liability on the merits against petitioner and the final defendant (Pet. App. 15). Only petitioner appealed (*id.* at 1).

The district court concluded that petitioner had breached his fiduciary obligations to the Plan in three ways: first, as a member of the Plan Benefit Committee, he had selected, failed adequately to monitor, and approved payment of excessive administrative fees from Plan assets to EIA, in violation of Section 404(a)(1)(A) and (B) of ERISA, 29 U.S.C. 1104(a)(1)((A) and (B); second, as a member of the Plan Benefit Committee, he had authorized the use of Plan assets to pay commissions to insurance agents marketing the Plan, in violation of Section 404(a)(1)(A) of ERISA, 29 U.S.C. 1104(a)(1)(A); finally, he himself had received commissions from Plan assets, which constituted unlawful transfers of Plan assets to a party in interest, in violation of Section 406(a)(1)(C) and (D) of ERISA, 29 U.S.C. 1106(a)(1)(C) and (D). To redress these violations, the court enjoined petitioner from ever again serving as a fiduciary or provider of services to any ERISA-covered plan. It also ordered him individually to make restitution to the Plan of $319,751, and found him jointly liable for an additional $371,894. Pet. App. 15-17.

The court of appeals affirmed (Pet. App. 1-5). Declining "to issue an advisory opinion" on petitioner's constitutional claim, the court held that he lacked standing to challenge the constitutionality of ERISA's exemption of church plans (*id.* at 3). It also rejected petitioner's argument that the Plan is not covered by ERISA, stating that while petitioner's "argument that Local 227 was a sham union is, no doubt, in large part correct[,] [n]evertheless, Local 227 meets the minimum requirements necessary to qualify as an 'employee organization' " under ERISA (*id.* at 4-5).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner first contends (Pet. 6-10) that ERISA unconstitutionally exempts church plans from coverage. Petitioner states (*id.* at 9) that he is not challenging the church plan exemption under the Establishment Clause. Rather, he says (*id.* at 8), he is arguing on equal protection grounds that "the statute is invalid because it unreasonably classifies" church plans as exempt but does not exempt plans established by other charitable organizations from ERISA's coverage. In petitioner's view, this Court should remedy this alleged equal protection violation by extending the exemption to all organizations covered by Section 501 of the Internal Revenue Code. Since "labor unions" are among such organizations, and since the Plan at issue was established by a union, petitioner's liability for ERISA violations would thereby be extinguished.

There is no basis for petitioner's argument. As ERISA's legislative history shows, Congress was concerned that imposition of ERISA's requirements on church plans, coupled with the governmental monitoring required under the Act, might create unwarranted intrusions into "the confidential relationship that is believed to be appropriate with regard to churches and their religious activities." S. Rep. 93-383, 93d Cong., 1st Sess. 81 (1973). It seems clear that this Court would uphold the exemption in a case challenging it under the Establishment Clause.[3] Congress's

[3] The "church plan" exemption is consistent with numerous cases in which this Court has condoned or required a similar balance to be struck between governmental regulation and religious organizations in order to avoid the type of excessive entanglement prohibited by the Establishment Clause. See, *e.g.*, *Corporation of the Presiding Bishop* v. *Amos*, No. 86-179 (June 24, 1987), slip op. 11 (exempting religious organizations from Title VII's prohibition against religious discrimination); *Aguilar* v. *Felton*, 473 U.S. 402, 409 (1985) (prohibiting use of public funds to provide instructional services in parochial schools in part because of the elaborate supervision required to assure church-state separation); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981) (reading

desire to avoid intrusion into church activities was a reasonable basis[4] for exempting church plans, and not other charitable organizations, from ERISA's coverage, so there is no equal protection violation.

In any event, as the court of appeals concluded, petitioner lacks standing to bring an equal protection challenge. To have standing, an individual must demonstrate a " ' "distinct and palpable injury". . . that is likely to be redressed if the requested relief is granted.' " *Valley Forge Christian College* v. *Americans United For Separation of Church & State Inc.*, 454 U.S. 464, 475 (1982)(citations omitted). That is, a litigant must demonstrate a "fairly traceable" link between the government conduct he challenges and the injury he has suffered. *Allen* v. *Wright*, 468 U.S. 737, 757 (1984). There is no such link here. Even if there were no reasonable basis for exempting church plans from ERISA's coverage, the appropriate remedy would be to strike down the church plan exemption, not, as petitioner suggests, to extend it to encompass other organizations. Congress plainly intended that most charitable organizations would be subject to ERISA's requirements, as it exempted only churches, and only under certain circumstances, from the statute's coverage. Thus, assuming arguendo the invalidity of the statute because there is no reasonable basis for distinguishing churches from other charitable organ-

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Federal Unemployment Tax Act (26 U.S.C. 3309(b)) to require exemption of church-operated schools from liability for payment of state unemployment taxes); *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 507 (1979) (construing National Labor Relations Act (29 U.S.C. (& Supp. III) 151 *et seq.*) to exclude coverage of teachers in church-operated schools); *Walz* v. *Tax Comm'n*, 397 U.S. 664, 677 (1970) (rejecting challenges to state property tax exemption for churches).

[4] Petitioner appears to agree (see Pet. 8) that the reasonable basis standard is applicable. It plainly is, as no fundamental right or suspect classification is involved here. *Regan* v. *Taxation With Representation*, 461 U.S. 540, 547 (1983).

izations, it is fairly clear that Congress would conclude that all such organizations should be subject to ERISA, rather than that all should be exempt. It is, moreover, implausible to suggest that Congress would want to exempt labor union officials establishing employee benefit plans from the fiduciary obligations ERISA imposes, or that it could not reasonably cover them while exempting plans established by other Section 501 organizations. It therefore follows that plaintiff's alleged injury is not likely to be redressed should his equal protection argument prevail.

2. The courts below also properly concluded that the Plan at issue is covered by ERISA. Section 4(a)(2) of ERISA, 29 U.S.C. 1003(a)(2), specifies that coverage under the Act extends to any "employee benefit plan * * * established or maintained * * * by any employee organization." An "employee benefit plan" includes "any plan * * * established or maintained * * * for the purpose of providing for its participants * * * medical, surgical, or hospital care or benefits * * *." 29 U.S.C. 1002(1). An "employee organization" is defined as "any labor union or any organization of any kind * * * in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment * * *." 29 U.S.C. 1002(4). The Plan at issue is plainly covered by ERISA, as it indisputably was established to provide medical benefits to members of Local 227, which is a labor union.

Petitioner renews (Pet. 11-12) his contention that Local 227 was a sham union, and not an "employee organization" within the meaning of ERISA. There is no merit to that shameless argument. Local 227 was an affiliate of an international union, and, while its officers apparently were more interested in making money for themselves than in traditional union activities, the record

shows that Local 227 entered into collective bargaining agreements with eight firms. Findings 2.[5] It thus appears to be a labor organization. The fact that Local 227's officers did not live up to its stated objectives should not remove the employee benefit plan it established from ERISA's coverage, and hence from the fiduciary obligations it imposes.

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[5] The Plan here is clearly distinguishable from the plan at issue in *Bell* v. *Employee Sec. Benefit Ass'n*, 437 F. Supp. 382 (D. Kan. 1977), the sole authority upon which petitioner relies (Pet. 11) in attempting to avoid coverage. There was no evidence there that the entrepreneurs selling insurance under the label "employee benefit plan" in *Bell* had taken any steps, such as affiliating with an international union or entering into collective bargaining agreements with employers, that are typical of labor organizations (although not prerequisite to status as a labor organization under ERISA). Thus, there was not even a sham union in that case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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